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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 945

E. E. ELMER, Doing Business As MISSISSIPPI TESTING LABORATORIES,
Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. .....

E. E. ELMER, Doing Business As MISSISSIPPI TESTING LABORATORIES,
-Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

E. E. Elmer, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on the 29th day of February, 1960.

OPINIONS BELOW.

The opinion of the District Court for the Southern District of Mississippi, Jackson Division (R. 40), is reported at 174 F. Supp. 437. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 72) is reported at 275 F.2d 89, and a copy thereof is appended to this petition at pages A7 through A11.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Fifth Circuit was made and entered on February 29, 1960 (R. 78), and a copy thereof is appended to this petition at page A12. Jurisdiction to review this judgment by Writ of Certiorari is conferred upon this court under 28 U.S.C.A. 1254. Federal jurisdiction in the court of first instance was invoked under 40 U.S.C.A. 270 (b).

QUESTIONS PRESENTED.

The questions presented by this petition are:

1. Did Congress intend to exclude from the protection of the Miller Act (Act of August 24, 1935, 49 Statutes 793, 794; 40 U.S.C.A. 270 (a) and (b)), all subcontractors who come on to a Federal project site and there, with the knowledge of the Prime Contractor, perform an integral part of the required contract work, except those subcontractors having a *direct* contractual relationship to the prime contractor or the prime's direct and immediate subcontractors?

2. Did Congress intend for the Miller Act to narrow the class of persons previously protected under the Heard Act (Act of August 13, 1894, 28 Statutes 278, as amended

by Act of February 24, 1905, 33 Statutes 811) which it supplanted?

3. Did this court in the case of *Clifford F. MacEvoy Co. v. United States for the Use and Benefit of Calvin Tomkins Co.*, (1944) 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163, intend to define the word "subcontractor", as used in the Miller Act, so as to exclude all persons who did not take *directly* from and perform *directly* for the prime contractor?

STATUTES INVOLVED.

The controlling statutes are, by popular name, the Miller Act (Act of August 24, 1935, 49 Statutes 793, 794, 40 U.S.C.A. 270 (a) and (b)), the pertinent portions of which are set forth in the appendix at pages A1 through A3.

STATEMENT.

The facts in this case have been stipulated (R. 34-39). In outline they are:

Tyler-Hyde Construction Company was the financing prime contractor on construction work at Key Field Air Base in Meridian, Mississippi, under a contract with the United States. Tyler-Hyde executed the required statutory payment bond in connection therewith. The Respondent, United States Fidelity & Guaranty Company, is Surety in the bond.

Tyler-Hyde performed no part of the contract work. All of this work was subcontracted to two firms T. F. Scholes, Inc., contracted to perform all work except certain concrete paving. One item which Scholes undertook was

certain asphalt paving. Scholes, in turn, contracted with Acme Asphalt Paving Company to perform this asphalt work (R. 35). In connection with its contract, Acme employed petitioner to perform required inspection and testing services at the job site.

Tyler-Hyde had actual knowledge that both Acme and Elmer were performing portions of the work required by its prime contract. During the performance of Elmer's work, Tyler-Hyde was furnished copies of statements covering Elmer's services. The total amount of Elmer's final bill was $1,966.61. Acme failed to pay Elmer and is bankrupt. Proper and timely notice was given by Elmer to Tyler-Hyde of Elmer's claim. Both Tyler-Hyde and U.S.F.&G., the Surety, have refused this claim, hence the present litigation.

The District Court dismissed the action on motion for summary judgment. This dismissal was affirmed by the Court of Appeals for the Fifth Circuit. The District Court and the Court of Appeals relied upon *MacEvoy* v. *United States, supra*, as entirely controlling. Both courts held that the MacEvoy case required a decision that Acme Asphalt Paving Company was not a subcontractor on this project within the meaning of the Miller Act because Acme did not *directly* "perform for and take from the prime contractor" any part of the required contract work.

REASONS FOR GRANTING THE WRIT.

The decision below should be reviewed because, with deference, we submit this decision is based on an erroneous interpretation of the decision of this court in the *MacEvoy* case. Such a holding substantially nullifies the paramount intention of Congress in enacting the Miller Act. Unless

reviewed, it will result in denying this Act's protection to a very large class of persons obviously intended to be protected. This could produce inequities in federal public works projects where usual lien rights are not available to those furnishing labor and materials. It could thereby produce a reluctance on the part of competent personnel to perform services on such projects.

The decision of the court below conflicts with, rather than follows, this court's decision in the *MacEvoy* case and the cases of *United States for the use of Hill* v. *American Surety Co.*, (1906) 200 U.S. 197, 26 S. Ct. 168, 50 L. Ed. 437; *Mankin* v. *United States for the use of Ludovici-Celadon Co.*, (1910) 215 U.S. 533, 30 S. Ct. 174, 54 L. Ed. 315; and *Illinois Surety Co.* v. *John Davis Co.*, (1917) 244 U.S. 376, 37 S. Ct. 614, 61 L. Ed. 1206. In the alternative, we submit it constitutes an erroneous decision on a question of federal law of far-reaching importance which has not been decided, but should be settled by this court. In either event this court should grant review.

The Heard Act provided that the prime contractor on a federal works project should execute a bond containing the obligation to:

> "promptly make payment to all persons supplying *him or them* with labor and materials in the prosecution of the work provided for in such contract." (Emphasis supplied).

The courts first held that this phrase meant that the materials and labors contemplated had to be furnished *directly* to the prime contractor. *United States* v. *Simon et al.*, (1899) (C.C.A.2d) 98 Fed. 73; *United States for the use of Harvey* v. *Farley et al.*, (1899) (C.C. Iowa) 91 Fed. 474. When this question was brought first to the Supreme Court this court held, in the *Hill* case, *supra*, that it was not

necessary for the labor or materials to be supplied *directly* to the prime contractor. Speaking through Mr. Justice Day, the court found the manifest purpose of the statute to be that labor and material actually contributed to the construction of public buildings be paid for; and the court pointed out the ease with which the contractor could protect himself against loss by requiring that those who performed for him give security by bond. In the words of Justice Day:

> "Statutes are not to be so literally construed as to defeat the purpose of the legislature. 'A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter.' *United States* v. *Freeman*, 3 How. 556, 11 L. Ed. 724. 'The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.' Chief Justice Marshall, in *Durousseau* v. *United States*, 6 Cranch. 308, 3 L. Ed. 232."

The *Mankin* and *Illinois Surety* cases, *supra*, were to similar effect. They emphasized the essential intention of the Heard Act—security—as well as the protection that the contractor and surety could easily have.

This court made it clear in the *MacEvoy* decision that Congress considered the Heard Act and its successor, the Miller Act, to be highly remedial in nature and entitled to a liberal construction. The court also specifically pointed out that Congress was not dissatisfied with the extent of coverage attributed to the Heard Act by the courts and it found that Congress, in enacting the Miller Act intended to keep all of the basic protections of the Heard Act as they had been and only desired to eliminate procedural difficul-

ties so as to make the Act more usable to those it protected.

In the construction of these remedial statutes this court has, in effect, held that Congress intended for the Act to be as broad in scope and coverage as it could be without placing remote and undeterminable liabilities on the prime contractor and his surety. Certainly the prime contractor can control who comes onto the job and performs those things he is required to do. Sure it is also, that he can protect himself (and usually does) in one or more of the many ways this court has suggested in the Heard Act cases referred to above. A glance at the "Chart of Corresponding Liabilities and Protections" on page A5 of the appendix, demonstrates that there is no reason to arbitrarily cut off any *performing subcontractor* who actually comes on to the job and, in a sense, representing the prime contractor, actually performs an integral part of the contract requirements. The prime contractor and his surety by usual and ordinary procedures can be as secure and free from remote liability from such *performing subcontractors* as they can be if the prime contractor undertakes the work himself.

All that was decided in the MacEvoy case was that a materialman was not a subcontractor within the meaning of the Miller Act.

The cogent reasoning supporting this decision was that there were relatively few performing subcontractors, and these should or could be known to the prime contractor. Protection by bond or otherwise in such situations is entirely usual and easy to accomplish. On the other hand, protection against unknown liabilities in dealing with a remote materialman who may be a manufacturer, wholesaler or retailer and may in turn deal with innumerable

other materialmen and laborers is difficult or impossible and could create precarious and perilous risks on the prime contractor and his surety. Such persons are normally accorded no lien protection on private projects. When the proper extent of protection of the Miller Act is viewed in this light of the ability of the prime contractor and his surety to protect themselves from remote and unknown liabilities and usual lien rights then the true meaning of the *MacEvoy* decision and its patent inapplicability in the present situation are clear.

The Miller Act payment bond is basically intended to substitute for the lien rights which would be available if the project were a private one. *United States* v. *Munsey Trust Co. of Washington, D. C.*, (1947) 332 U.S. 234, 67 S. Ct. 1599, 91 L. Ed. 2022. If this analogy is followed the distinct differentiation by the courts and Congress between a remote materialman and a subcontractor may be readily discerned.

An interpretation of the Miller Act to exclude from its coverage those who do not deal *directly* and in privity of contract with the prime contractor or his immediate subcontractors could actually lead to the very abuses which the Miller Act intended to prevent. (In this case Tyler-Hyde was not the prime contractor in the usual sense of that term. In fact, Tyler-Hyde was not a performing contractor at all. It did none of the physical or material work involved. Instead, in essence, it was the financier. It had the bonding power to "carry the project".) By the device of successive subcontracts or assignments through a series of non-performing contractors it is entirely possible that no person coming on to a federal works project and there performing essential and required parts of the project could have protection under the payment bond required

by the Miller Act and, of course, they could claim no lien. The paramount intention of the Congress would thus be completely defeated.

With deference, it is submitted that it would certainly constitute improper discrimination to interpret the Act broadly enough to permit recovery where the labor or materials sued for are not even incorporated in the project, (Cf. *Brogan* v. *National Surety Co.*, (1918) 246 U.S. 257, 38 S.Ct. 250, 62 L.Ed. 703, L.R.A. 1918D 776; *Fourt* v. *United States*, (1956) (10th Cir.) 235 F.2d 433; *Glassell-Taylor Co.* v. *Magnolia Petroleum Co.*, (1946) (5th Cir.) 153 F.2d 527 and cases there cited) yet place such strict construction on a single word that many, if not most, of those whose labor and material bring the project to fruition must do so without the benefit of lien or bond protection.

The exact factual situation here presented has been finally disposed of in one other Circuit Court case and in two District Court decisions. In the cases of *United States* v. *Frederick Raff Co.*, (1959) (1st Cir.) 271 F.2d 415 and *United States* v. *Blount Bros. Construction Co.*, (1958) (D.C. Md.) 168 F. Supp. 407, the courts, recognizing no distinction between a materialman and a performing subcontractor, held that the *MacEvoy* decision required them to deny Miller Act bond coverage to subcontractors who lacked a direct relationship with the prime contractor.

In the District Court case of *McGregor Architectural Iron Co.* v. *Merritt-Chapman & Scott Corp.*, (1957) (D.C. M.D. Pa.) 150 F. Supp. 323, the court held that the performing subcontractor there qualified under the *MacEvoy* case as one of "the relatively few subcontractors who performed part of the original contract" and who accordingly "represent in a sense the prime contractor and are well known to him."

We believe that the decision of the court below engrafts upon this court's definition of the word "subcontractor" in the *MacEvoy* case an additional term which is unwarranted, and that is that it requires—as *MacEvoy* did not—a *direct* relationship between the performing subcontractor and the prime contractor, which is entirely inconsistent with this court's decisions under the Heard Act. Such an interpretation of the *MacEvoy* case places a strict construction on the Miller Act rather than the liberal construction to which this same decision finds it is entitled. Such an interpretation reaches what we submit, with deference, is the incongruous result of divining a Congressional intent to make an existing law more functional then holding that Congress has proceeded to thwart that intention.

CONCLUSION.

With deference, we submit that the *MacEvoy* case never intended to cover the factual situation here presented and has been misinterpreted by the court below. The *MacEvoy* case did not intend to determine the rights of performing subcontractors, either *direct* or indirect, but only related to fixing the rights of remote materialmen. It is respectfully submitted that this petition for a writ of certiorari should be granted.

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Of Counsel.

PROOF OF SERVICE CERTIFICATE.

I, CHARLES CLARK, one of the attorneys for E. E. Elmer, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 16th day of May, 1960, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the United States Fidelity and Guaranty Company, respondent, by mailing two true copies thereof in a duly addressed envelope with first class postage prepaid (the distance being less than 500 miles), to its attorneys of record, as follows:

To: E. L. Snow,
J. A. Covington,
Rodger B. Shows,
Address: Snow, Covington & Shows,
First National Bank Building,
Meridian, Mississippi.

Charles Clark,
Attorney for E. E. Elmer, d/b/a Mississippi Testing Laboratories.
Address: P. O. Box 158,
900 Lamar Life Building,
Jackson, Mississippi.

APPENDIX

APPENDIX.

The Miller Act (Act of August 24, 1935, 49 Statutes 793, 794; 40 U.S.C.A. 270 (a) & (b))

§ 270a: *Bonds of contractors for public buildings or works;* waiver of bonds covering contract performed in foreign country.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,-

000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. Aug. 24, 1935, c. 642, § 1, 49 Stat. 793.

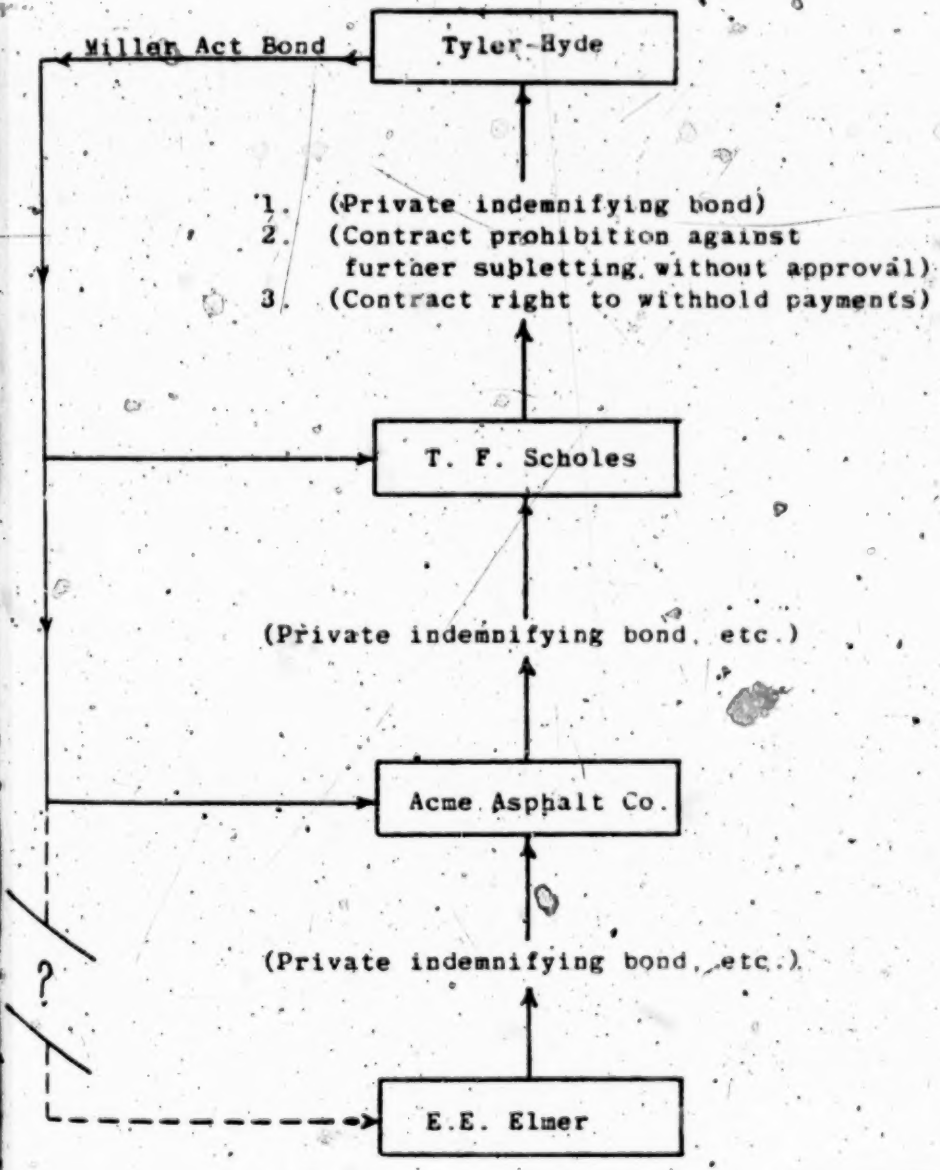
§ 270b. *Same; rights of persons furnishing labor or material.*

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied

the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. Aug. 24, 1935, c. 642, § 2, 49 Stat. 794.

CHART OF CORRESPONDING LIABILITIES AND PROTECTIONS[1]



[1] Presuming normal and usual contracting procedures had been followed

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 18086.

E. E. ELMER, d/b/a MISSISSIPPI TESTING LABORATORIES,
Appellant,

versus

UNITED STATES FIDELITY & GUARANTY COMPANY,
Appellee

Appeal from the United States District Court for the Southern District of Mississippi.

(February 29, 1960.)

Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

JONES, Circuit Judge: We have reviewed a judgment for the defendant in a suit on a contractor's bond given pursuant to the requirements of the Miller Act.[1] Tyler-Hyde Construction Company contracted with the United States for grading, asphalt paving, and concrete paving, at the Key Field Airport in Meridian, Mississippi. The appellee, United States Fidelity & Guaranty Company, was surety on the Miller Act bond. Tyler-Hyde sublet the grading and asphalt paving to T. F. Scholes Company which, in turn, made a contract with

1. 40 U.S.C.A., § 270a *et seq.*

Acme Asphalt Company to do the asphalt paving. Acme employed the appellant, E. E. Elmer, to perform inspection and testing services. Tyler-Hyde knew that the appellant was rendering services on the job. The appellant's charge for his services was $1,966.61. Acme did not pay the appellant. Acme has become a bankrupt. The appellant asserted a claim against Tyler-Hyde and the appellee surety. The claim was rejected and suit was instituted by the appellant against the appellee. The pertinent facts were stipulated. From an adverse judgment the appellant has brought the case before us for review.

It was contended by the appellee that the bond of the prime contractor, Tyler-Hyde, given pursuant to the Miller Act, covers only those who contract directly with the prime contractor or with a sub-contractor, and that it does not cover a person who has no contract except with one who has contracted with a sub-contractor of the prime contractor; or in other words, that the bond of Tyler-Hyde covers only those who contract directly with its sub-contractor Scholes, and that its bond does not cover Elmer whose contract was with Acme which was not a sub-contractor of Tyler-Hyde, the prime contractor, but of Scholes. To sustain this contention the appellee directs attention to Section 2 of the Miller Act.[2] The district

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2. "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That

court adopted this view, and set it forth in a well reasoned opinion. *Elmer* v. *United States Fidelity & Guaranty Co.*, 174 F. Supp. 437. The district court followed and applied the principles announced in *MacEvoy* v. *United States*, 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163.

In the MacEvoy case the claimant had furnished materials to one from whom the prime contractor had purchased them for use on the job. In the MacEvoy case it was held that the claimant could not recover. The appellant here seeks to distinguish the MacEvoy case on the basis of factual differences. The factual difference exists but does not call for a different principle. The language of the MacEvoy opinion furnishes us with a rule for decision here. As is pointed out in the opinion of the district court, MacEvoy holds that a sub-contractor, as that term is used in the Miller Act, is one who performs and takes from the prime contractor a specific part of the labor or material requirements of the original contract. Scholes was a sub-contractor of Tyler-Hyde. Acme had a direct contractual relation with the sub-contractor Scholes

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any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons." 49 Stat. 794, 40 U.S.C.A., § 270b(a).

and hence would have been covered by the bond. But Acme was not a sub-contractor since it performed its work for Scholes rather than for the prime contractor, Tyler-Hyde. Since the appellant was not a sub-contractor within the meaning of the Miller Act and did not have a direct contractual relationship with a sub-contractor, he cannot recover. As said in MacEvoy, "To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act." 322 U.S. 102, 108.

The conclusions we have reached are in accord with *United States* v. *Frederick Raff Co.*, 1st Cir. 1959, 271 F.2d 415; *Basich* v. *United States*, 9th Cir., 1946, 159 F.2d 182; and *United States* v. *Blount Brothers Construction Co.*, D.C.Md. 1958, 168 F. Supp. 407. *McGregor Architectural Iron Co.* v. *Merritt-Chapman & Scott Corporation*, D. C. M. D. Pa. 1957, 150 F. Supp. 323, is contra and seemingly stands alone.

The judgment of the district court is AFFIRMED.

RIVES, Chief Judge, Specially Concurring:

As I read *MacEvoy* v. *United States*, 1944, 322 U.S. 102, it held simply that a materialman is not a "sub-contractor" within the meaning of the proviso to 40 U.S.C.A., §270 (b), which is very different from the issue presented in this case, viz., whether a subcontractor several times removed, a "sub-sub-subcontractor," is such a "sub-contractor."

While I recognize that the dominant purpose of the Miller Act was to ameliorate certain procedural difficulties in the Heard Act and to permit a more prompt recovery under the payment bond, the legislative history cited in the following part of the *MacEvoy* opinion com-

pels me to concur with the judgment of affirmance in this case:

"The proviso of § 2 (a), which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act.[5] Moreover, it would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor but not from more remote claimants.

"[5] 'A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond.' H. Rep. No. 1263 (74th Cong., 1st Sess.); p. 3."

322 U.S. 102, 107-8.

Somewhat reluctantly, I concur.

A true copy

Test:

/s/ Edward S. Wadsworth,

(Seal) Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

April 11, 1960.

Judgment.

Extract from the Minutes of February 29, 1960.

E. E. ELMER, d/b/a MISSISSIPPI TESTING LABORATORIES,

No. 18086

versus

UNITED STATES FIDELITY & GUARANTY COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed:

It is further ordered and adjudged that the appellant, E. E. Elmer, d/b/a Mississippi Testing Laboratories, and the surety on the appeal bond herein, Firemen's Fund Insurance Co., be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Chief Judge, Specially Concurring."

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 945

E. E. ELMER, Doing Business As
MISSISSIPPI TESTING LABORATORIES
Petitioner

VS.

UNITED STATES FIDELITY & GUARANTY
COMPANY
Respondent

BRIEF OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARGUMENT

We disagree with counsel for the petitioner that the decision complained of is based upon an erroneous interpretation of the **MacEvoy** case or that it conflicts with, rather than follows that case.

We submit that the decision complained of does not constitute an erroneous decision on a question of federal law of far-reaching importance which has not been decided, but which needs to be settled by this court.

The Question Involved Has Been Settled Already

The federal question of far-reaching importance was long since settled by this court in the **MacEvoy** case, which is plain and unequivocal, and which embraces every legal principle involved in the decision complained of. Since the **MacEvoy** decision there have been few reported cases on the subject. It was made the basis of decision by the district courts in:

U. S. use Newport News vs. Blount, 168 Fed. Sup. 407 (Md. Dist.) (11/25/58)

E. E. Elmer, doing business as Mississippi Testing Laboratories vs. United States Fidelity & Guaranty Company, 174 Fed. Sup. 437

It was not followed in **McGregor vs. Merrit-Chapman, 150 Fed. Sup. 323 (Pa. Dist.) (4/26/57).**

It was the basis of decision by the Court of Appeals for the 2nd Circuit in **Basich vs. U. S. use of Turner, 159 Fed. (2d) 182 (9th) (12/26/46)** and in **United States, use W. J. Halloran Steel Erection Co. vs. Frederick Raff Company, Inc., Advance Sheets 271 Fed. (2d) 415 (1st Cir.) (11/24/53)**, by the 1st Circuit in **U. S. use Pandolf vs. Nassif, 194 Fed. (2d) 912 (1st) (3/6/52)**, and now by that of the 5th Circuit in **E. E. Elmer, doing business as Mississippi Testing Laboratories vs. United States Fidelity & Guaranty Company, 275 Fed. (2d) 89.**

The Miller Act is Complete Within Itself And Does Not Depend For Its Effective Operation Upon Arrangements Made by Government Contractors.

We see no good purpose to be served in discussing such cases as the **Hill** case, the **Mankin** case, and the **Illinois Surety Company** case cited by the petitioner, which hold that a furnisher to a sub-contractor is protected by the Heard Act. It is true that those cases suggest that the prime contractor may protect himself by requiring bond from his sub-contractor, but that is as far as the suggestion goes. We know of no case which suggests a method of bond protection beyond the sub-contractor.

Counsel for petitioner states in his brief that the Miller Act should be construed so as to give it as broad a scope and coverage as can be, without placing remote and undeterminable liabilities on the prime contractor and his surety. Counsel then urges that the prime contractor may free himself from remote liabilities by usual and ordinary procedures.

Vast government projects frequently involve a wide range of complex activities of wholly different nature and requiring wholly different equipment, knowledge, and capabilities, for execution. These activities on one project may range from the excavation of dirt and rock to the fabrication and installation of the most delicate scientific instruments. It is seldom that the prime contractor undertaking a sizable government project of diverse aspects is prepared to do all the work himself. He usually re-lets, and those to whom he re-lets, further re-let, with the purpose of placing the entire job in the hands of those prepared to accomplish its various parts. As a matter of fact, it is not unusual on a large government construction project to have as many as 15 or 20 tiers of contractors all engaged at the same time upon various phases of the work undertaken by the prime contractor.

Of course, upon making a sub-contract, the prime contractor could require the sub-contractor to contract to per-

form the work himself and contract not to re-let any portion of it. Then there could be no claimants except furnishers of labor and materials to the prime contractor and the sub-contractor, and all would be covered by the Miller Act. However, this would be no way for the prime contractor to protect himself against remote liabilities referred to because there would be none. There could be no sub-contractor beyond the first, because prohibited by the contract. No claimant could be remote because all would be direct and immediate.

Also, it might be legally possible for the prime contractor to enforce an arrangement by which all lower tier contractors would be required to give bonds so conditioned that the prime contractor would be protected against the most remote liabilities.

However, such a limitation on the power to contract would not only deprive the prime contractor and the sub-contractor of valuable rights, but would burden the normal processes by which large construction projects are arranged and carried out, which have been pointed out heretofore.

We submit that there is nothing in the Miller Act itself and nothing in its congressional history or in the committee reports dealing with it, which indicates a legislative intent to restrict full freedom of contract or to impose the duty upon a government contractor of so arranging his contractual affairs that the Act will cover every person who may claim its protection. The Act is complete within itself and does not depend for its effective operation upon contractual arrangements.

While on this subject of protection, it may be suggested here that a furnisher of materials or services to a low tier contractor on a large government project has some duty to

protect himself. If he is not satisfied with the credit standing of the contractor with whom he deals, ordinary business prudence would require that he find out if there is a bond for his protection or at least to determine where his contractor stands in relation to preceding contractors on the identical work. Certainly, he is not justified in committing himself blindly to anybody he finds working on the project, in the hope that the Miller Act will protect him regardless of his status.

Counsel says that by the device of successive assignments the bond obligation would be defeated entirely. In the first place, there is nothing in the record to show that the prime contractor assigned anything in the sense that the prime contractor sold or transferred any contractual right against the government or became relieved of any contractual obligation to the government. The prime contractor simply subcontracted the grading and asphalt paving to Scholes and other parts of the original contract to others, but the prime contractor itself remained bound to the government. There is nothing whatever to show that anything was done by the contracting parties to accomplish any substitution of any one for any other.

The MacEvoy Decision Is Not Limited To The Status Of A Materialman As A Sub-Contractor.

Counsel for the petitioner states in his brief "all that was decided in the MacEvoy case was that a materialman was not a sub-contractor within the meaning of the Miller Act."

Since the **MacEvoy** decision there have been contentions in the trial courts in an effort to distinguish that decision from a particular case at bar so as to make it inapplicable to the particular case, and much has been made of the fact that the

McEvoy decision dealt with the rights of a supplier of materials to another supplier of materials. All else is usually referred to as dicta. A careful analysis of the decision will show that this fact was merely incidental. The key to the decision is that the materialman to whom the plaintiff supplied materials was not a sub-contractor because he had not taken from the prime contractor "a specific part of the labor or material requirements of the original contract."

The mere fact that a person dealing with the prime contractor is to furnish only materials has nothing to do with whether he is a sub-contractor. Although he furnishes nothing but materials, he is nevertheless a sub-contractor if by agreement with the prime contractor he furnishes a specific part of the material requirements of the original contract. A good illustration is **Hardwood Products vs. Johnson, 137 Fed. Sup. 562,** where the prime contractor on a post office contracted with a manufacturer to furnish all the millwork, required by the original contract and the supplier of lumber to the manufacturer for making the millwork was held to be a furnisher of materials to a sub-contractor.

If a marble yard delivers to the prime contractor a car load of marble slabs which are used in a building, it would not be a sub-contractor, as it would not have furnished a specific part of the material or labor requirements, and a quarry which supplied the marble yard with the slabs certainly could not recover under the Miller Act bond of the prime contractor. On the other hand, the case would be otherwise if the marble yard contracted with and furnished to the prime contractor all marble, dressed and cut, to fit all material requirements of the original contract for use in the construction of a marble arch in the building, as it would certainly be a sub-contractor, and the quarry could recover on the bond as a furnisher to a sub-contractor.

The fact that a person furnishes only materials in the prosecution of the work does not determine whether he is a sub-contractor, and neither does the fact that he may actually perform in its entirety an integral part of the original contract. His character and status as a sub-contractor or not depends upon whether he contracts with and supplies for the prime contractor a specific part of the requirements of the original contract, regardless of whether that involves materials or services, or both.

Direct Relationship With The Prime Contractor Or A Sub-Contractor Determines The Right To Bring Suit On A Payment Bond.

In the **MacEvoy** case the prime contractor, MacEvoy, entered into contract with the United States for the construction of a defense housing project, and gave the payment bond required by the Miller Act.

MacEvoy purchased from Miller building materials for the work. Miller in turn purchased these materials from Tomkins, who, upon not being paid, sued upon the bond.

The court stated the question for decision thus:

> "The ultimate question in this case, therefore, is whether Miller, the materialman to whom Tomkins sold the goods and who in turn supplied them to MacEvoy, was a sub-contractor within the meaning of the proviso. If he was, Tomkins' **direct** contractual relationship with him enables Tomkins to recover on MacEvoy's payment bond. If Miller was not a sub-contractor, Tomkins stands in too remote a relationship to secure the benefits of bond."

The court then proceeds to define precisely what is meant by the term "sub-contractor" within the contemplation and meaning of the Miller Act, viz:

> "Under the more technical meaning, as established by usage in the building trades, a sub-contractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract * * * "

In holding that Miller was not a sub-contractor and that Tomkins could not recover upon the bond for having furnished to Miller, the court, laid down the rule governing the right to bring suit on a payment bond, which the court stated is limited to:

> "(1) those materialmen, laborers and sub-contractors who deal **directly** with the prime contractor.
>
> "(2) those materialmen, laborers, and sub-contractors who, lacking express or implied contractual relationship with the prime contractor, have **direct** contractual relationship with a sub-contractor."

Counsel argues that unless a furnisher of labor or materials to anybody at all working upon a government contract is protected by the Miller Act bond of the prime contractor, the furnisher will be denied the protection of that bond, where labor or materials are supplied to one who is not a prime contractor or a sub-contractor. We submit that this is certainly correct and is exactly what the **MacEvoy** case holds. The bond protects those who furnish to the prime contractor and it protects those who furnish to any sub-contractor, but the **MacEvoy** case holds that this is as far as it goes when it states:

"Whether this statutory language is broad enough to include persons supplying material to materialmen as well as those in more remote relationships, we need not decide. Even if it did include such persons, we can not disregard the limitations on liability which Congress intended to impose and did impose in the proviso of No. 2(a)."

In the case at bar, the prime contractor made a contract with Scholes to perform the grading and asphalt paving, and in respect to that integral part of the original contract, Scholes was the sole sub-contractor.

Acme Asphalt Company, by contract with Scholes, did part of the paving and thus furnished labor and materials to a sub-contractor.

The plaintiff, Elmer, had no contract with the prime contractor to do anything and he had no contract with sub-contractor, Scholes, to do anything. The oral contract under which the plaintiff, Elmer, performed his services was with Acme Asphalt Company, which concern had no contract with the prime contractor but only with the sole sub-contractor.

However, it must be kept in mind that when Tyler-Hyde made the sub-contract with Scholes, it was not in contemplation of Acme ever being on the work at all, or Acme subsequently bringing Elmer on the work. Scholes could not relet its paving to Acme until after Scholes made its sub-contract with Tyler-Hyde and Acme could not contract with Elmer until after it made its contract with Scholes. In other words, Tyler-Hyde was not a party to any contracting done after it made the sub-contract with Scholes. It had no control over or connection with subsequent contracts made by Scholes, including that made by Scholes with Acme; and it

had no control over or connection with subsequent contracts made by Acme, including that made by Acme with Elmer.

Counsel emphasizes the proposition that Acme Asphalt Company, with which Elmer contracted, was a "performing" sub-contractor. Every person who is a sub-contractor at all is a "performing" sub-contractor.

Under the **MacEvoy** case there is no other kind. Under the definition set forth in that case a sub-contractor is one who "takes from the prime contractor a part of the labor and material requirements of the original contract." One who does that, is bound for performance of a part of the contract, regardless of whether his obligation is carried out and accomplished by actually doing the work undertaken or whether by contracting with others to do it.

Of course, every person who agrees to work for agreed pay is a contractor in a sense, and every man who drives a bull-dozer for the prime contractor on a construction project may be said to be a performing sub-contractor in a sense. He has a contract. He is performing useful and necessary services upon the project for which the prime contractor gets the benefit. The prime contractor knows that he is on the job and is expecting to be paid. But we are not dealing here with grammatical exactitude or merely spinning theories. We are dealing with the term "sub-contractor" in its technical meaning as established by usage in the building trades, which has been specifically defined by this Court as "One who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract."

Therefore, whether one performing services on a government construction project is within the protection of the Miller Act depends upon whether his services are rendered

to and for the prime contractor or to and for a sub-contractor. Nothing else will clothe him with the statutory protection. The fact that his services were valuable, or were necessary, or were rendered in good faith, or were performed on the site, or were well-known to all concerned, or that pay was known to be expected; are all beside the point.

CONCLUSION

We respectfully submit that the **MacEvoy** decision was not misinterpreted by the court below and that the petition for certiorari should not be granted.

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PROOF OF SERVICE CERTIFICATE

I, Joseph A. Covington, of counsel for the respondent, United States Fidelity & Guaranty Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served four copies of the foregoing Brief of Respondent To Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit, upon the petitioner, E. E. Elmer, doing business as Mississippi Testing Laboratories, by depositing the same in a United States Post Office or mail box with first class postage prepaid addressed to Mr. Charles Clark, counsel of record for the said petitioner, at P. O. Box 158, 900 Lamar Life Building, Jackson, Mississippi (the distance being less than 500 miles) on this the 13 day of June, 1960.

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